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Impact of the investment protection provisions in the Bilateral Investment Treaties and the Treaties, in general, on the ability of governments to regulate matters of public interest, i.e. taxes, commerce, etc.

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Abstract

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University.

This dissertation addresses the issue of the interaction between investment arbitration and state sovereignty. Specifically, in connection with the proposed EU-USA free trade agreement (TTIP, ISDS) there is quite some discussion on investor arbitration and whether this encroaches on the sovereignty of states. One particular allegation is, that investor-state arbitration restricts the ability of a government to impose new taxes, or to regulate public safety, commerce or health.

By seizing the opportunity given from the above- mentioned argument, it becomes the purpose of this thesis to deal with questions arising out of this matter. In particular, the questions are the following: **i)** Is it true that investment arbitration can limit down the sovereignty of a State or is it just a meaningless fear? **ii)** If the allegation is true, what is the kind and the size of impact that these clauses have on a government's law-making decisions? **iii)** Lastly, is such an impact a problem created by sloppily drafted arbitration clause/ investment protection provision, or maybe a flaw of the Bilateral Investment Treaties themselves? What other reasons could result to that?

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Keywords: BIT(s), Investment Arbitration, State Sovereignty, Arbitration clause(s), Investment Protection Provision(s)

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Introduction

During the past years, it was a common belief that, when it came up to the investor- state relationship, the first party was almost always the weakest one, since it had to comply with the national law of the Host State, which further means that it was subjected to the changes of the latter too. Inherently and clearly, changes are not always positive and can create problems of smaller or bigger importance to a thriving enterprise. Thus, in order for these negative consequences to be prevented, or at least limited as much as possible, investment protection provisions started being drafted and used in the text of international investment agreements. Investment protection provisions were implemented in Bilateral Investment Treaties[1] (hereinafter BITs), and until today, as designated by the name they are aiming to protect the investor from any unjust or excessively unfavorable alteration that the Host State might decide to implement in its legislation.

Over the years, investment protection provisions were not the only way investors could be protected, or even favored. Investor- State Dispute Settlement (hereinafter ISDS), too, came to the fore to protect investors in developing or undeveloped countries that had a more primitive national law, i.e. did not provide for adequate guarantees and safeguards in case a dispute between the state and the investor would arise. ISDS is considered by many to solve disputes in a more objective way than national courts do. However, the latter remains to the experience of the coming years to show. In addition to the discussed ways, one could say that stabilization clauses and umbrella clauses work also to the benefit of the investor as they are trying to protect them, in a different modus, from the extensive powers of the Host State. However, we should not forget that the aim of these clauses is not about the foreign investor to obtain unlimited powers, but to have the same level of protection and the same rights with other (national or not) investors. In other words, these clauses are destined not only to protect the investor against potential unfavorable legislation adopted by the Host State, but also to ascertain that foreign investors do not obtain a more favorable position compared to the one of the national investors.

[1] Apart from BITs, one should not forget to mention that the investment protection provision can also be included in other forms of official agreements, e.g. state contracts, (multilateral) treaties etc.

Thus, it has to be paid a lot of attention in order for these clauses not to override their initial purpose and for their function to have more of a positive effect, i.e. the one of providing balance between the interests of the Host State and the national and/ or foreign investors.

Nevertheless, both of the aforementioned ways, apart from the stabilization clauses and umbrella clauses, proved that they do not only provide protection to the investors, but also sometimes encroach on the sovereignty of the host states and limit it. There is a conflict between scholars, officials and any other social group that could possibly be affected by this encroachment, with one part saying that there is no such danger regarding the limitation or infringement of the sovereignty of the state and with the other one claiming that the danger is grave and imminent. Both sides have quite convincing arguments, which we will examine in more detail further on this paper. Baring that in mind, the importance of leaving intact the exclusive competences of the State is of utmost importance.

The implications and possible reasons arisen out of this encroachment will be analyzed hereinafter in this paper.

Investment Protection Provisions v. State Sovereignty

It is an undeniable truth that once a BIT is signed, both investor and Host State, they automatically give up a big part of their powers[2]. This loss of sovereignty, when we refer to the State, will be explained in detail below, but very briefly now the following has to be said. As far as the investor[3] is concerned, it is more appropriate to talk about loss of power or independence, rather than loss of sovereignty. The term sovereignty unquestionably matches better the notion of State and it is used as such in the by the academic community.

State Sovereignty

In international law, state sovereignty is conceived as the full right and full power of a State to govern itself without any other external power interfering in its decision making procedure, considering internal or external national policy. It is well- established that in order for a State to be sovereign, it must contain the following four elements: a) a permanent population, b) a defined territory, c) one government and d) the capacity to enter into agreements[4] with other sovereign states.

In regards with the field of investment law and its link to state sovereignty, the Host State -even if it is a developing or underdeveloped country- certainly has a complete[5] body of national legislation (i.e. regulating tax, commerce, health, public safety, environmental issues) with which not only domestic but also foreign companies must comply. As the very successful example, given by Antoon Struycken, says "*In some countries like local women, foreign women may have to wear in public a chador or may not be allowed to drive a car".*[6] Especially in cases when the Host State's economy is not based on diversification but on the exploitation of a very specific natural resource, then the State obviously focuses even more on protecting this element and its exploitation, by

[2] The term is given broadly in order to cover both investor and State.
[3] Any kind of private sector enterprise.
[4] Sign and ratify them.
[5] Sometimes more and others less complete, but still adequate enough to regulate a multitude of things.
[6] A. V. M., Struycken, ARBITRATION AND STATE CONTRACTS, Leiden, Hague Academy of International Law, 2015, pg. 26

raising a high legislative threshold around it. The more the Host State is regulating a matter the less room is left for the Investor to act freely. Once the investor makes an investment in the Host State, it willingly hands over a part of its power and independency to this State. The former does not mean that we have an unconditional surrender of the investor's powers to the State, but a controlled one, which takes place under the signing and ratification of a relevant investment protection agreement.

That having said, we tend to think that since the Host State has the privilege to impose its own legislation and regulate matters according to its needs, it also means that it is the most favored party. That would be, however, an understatement of the risks that the Host State takes. States are, nowadays, more and more calculating the costs and benefits deriving from the acceptance of an investment to take place in their territory. In addition to the risks, there are also some intended restrictions to which the Host State agrees, e.g. not to arbitrarily discriminate against the investor or not to confiscate the investor's properties without adequate compensation. Notwithstanding these intended restrictions, sometimes "unintended" consequences-restrictions[7] appear. One could wonder if it is, eventually, inevitable for the sovereignty of the State to be limited when an investment takes place in its territory. The reality is very close to the latter sentence. Signing an Investment Treaty means that the State signs agrees also to the investment protection provision[8] included in the Treaty, which in most cases further includes a provision that refers to investment arbitration. This practice can definitely constitute an eminent danger for the state's sovereignty as it is thought to downgrade not only the national courts, but consequently the national law in its entirety, by granting to the powerful investor special, if not conducive, legal rights.

Investment Protection Provisions

As implied above, it is inevitable that investments in a Host State are subject to its national legal context. Host States consider themselves to have sole authority over the investments and the

[7] cf. Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7)

[8] See below for further details.

activities of the investors in their national territory. Therefore, sometimes the investors are subject to the risks of alteration of the legislative environment and to the aggressive measures of confiscation, nationalization or expropriation. Every new government of the Host State may – and most probably- wish to follow another policy, which serves better its interests, by modifying or completely changing the legal context under which the investor concluded its investment. Hence, this can make the environment and the conditions under which the investor is operating unsustainable[9], insomuch as the Host State's law is the primary law applicable. It, therefore becomes clearer that investors need higher safeguards[10] to diminish the increased risks[11] taken by these investments.

For these reasons, investment protection provisions are considered necessary in order for a balance to be kept between these contrasting forces. Investment protection provisions seek to achieve and offer adequate protection to the investor, who undertook a big responsibility and invested money and time in order to have a future profit out of an investment. More specifically, in the light of the EU- US trade agreement[12], investment protection provisions are considered to encourage investment by providing the abovementioned guarantees. As indicated by the name, their purpose of existence is to protect the investment, i.e. the interests of the investor, and ensure that in case a disagreement will arise Investment Arbitration will be the only path –or at least the most preferred one- that the parties will follow[13]. A brief remark about these two notions, in addition to the ones of investment and BITs, is needed in order to pay to them the attention they deserve and also to avoid any kind of academic jargon or confusion concerning their definition.

[9] This is mostly the reason that stabilization clauses, umbrella clauses or intangibility clauses are drafted.
[10] This higher protection for the investor from state impunity or weak court systems in developing countries, lead to the other extreme, i.e. large corporations gained more power in challenging the legislation of the Host State, even when the State is a developed country.
[11] We will state the obvious that there is always a percentage of risk taken when an investment is made and its amount is depending and varies according to the different circumstances of every case.
[12] Regarding which there will be further talk below.
[13] There is not a single case registered of an investment protection provision giving priority to the domestic courts as dispute settlement method, instead of arbitration.

Investor

The notion of the investor plays a very important role in the field of investment arbitration, however we will only briefly comment on it as it does not constitute one of the things mainly discussed on this paper. An investor can be whether a natural or legal person, with each one receiving a different treatment and being subjected to different conditions. In the sector of investment we usually find legal instead of natural persons. It is more common to find big investment companies, and not individuals, being able to take responsibilities of this size, like the ones that are intended when we refer to investments in a third State. These investments cost some millions or billions of dollars and have the purpose of exploitation of natural resources, construction of national roads or hospitals etc. Conclusively, it is not something that a sole individual would or could undertake.

Investment

Due to the well- known Salini case[14] there was introduced a four- point test that arbitrators were to use to determine which business activities constitute an investment. According to this test, an investment should gather the following elements: a) contribution of money or assets, b) a certain duration over which the project was to be implemented, c) an element of risk and d) a contribution to the Host State's economy.

The Salini test and its four criteria found many supporters, but also many opponents and, finally, these criteria were adjusted according to each case, by removing the fourth criterion or adding some more, depending always on the needs of the case. However, it still remains one of the main and most important ways to define the notion of investment.

Bilateral Investment Treaties

The history of the BITs goes back on the 19th Century when the European and US countries on the one side and the Central and South- American countries on the other side argued on what

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[14] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco* (*ICSID Case No. ARB/00/04). Available online (accessed 24 November 2015): http://www.italaw.com/sites/default/files/case-documents/ita0738.pdf*

the right treatment for foreign investment is. This was resolved by the advent of a form of a BIT. The first one was signed between the Federal Republic of Germany and Pakistan in 1959 in order to enable Germany to ensure or guarantee the safety of its investment. As indicated just before the motives for the creation of this type of agreements was to increase the attractiveness of under- developed countries with nonexistent legislation for (foreign) investment. The epicenter of this action was obviously the interests of the investor. This was also one of the reasons that the International Center for Settlement of Investment Disputes (ICSID) was founded. Today, BITs are a commonplace and are concluded in a regular basis between states before an investment will take place, and investors from these States do benefit from them.

Investment Arbitration

Investment arbitration constitutes a tool in the disposal of foreign corporations in order to challenge government policies, decision- making procedures and actions that are considered culpable for reducing the safeguards under which they concluded their investments and for diminishing the value of the latter. It can be based on a) an Investment Treaty (multilateral or bilateral), b) the investment law of the Host State or even sometimes c) an investment agreement. As any other type of arbitration, it can be whether institutional[15] or ad hoc. Investment Arbitration comes as an alternative to the traditional option of the recourse to national courts and is almost always preferred by the private sector[16], i.e. private entities, companies, corporations etc. Even though many keep a critical eye towards investment arbitration and arbitration in general, the last decades it gains more and more advocates and constitutes the first choice amongst the dispute resolution methods for the majority of the investors.

[15] ICSID Convention is an international arbitration institution and constitutes the main instrument for the settlement of investor-state disputes

[16] On the contrary, the public sector, i.e. States, prefers national courts, since it can benefit much more from it in terms of being aware of its national law and trusting the independency of its judges.

Effects That the Investment Protection Provisions May Have On State Sovereignty

As explained in the relevant paragraph[17], we must not forget the fact that every time the Host State is entering into a BIT it automatically and willingly agrees to give up, and if one could say "sacrifice", a part of its sovereignty, as it agrees not to proceed to a series of actions, which in any other case would be allowed to take, i.e. not to arbitrarily discriminate against the investor, not to confiscate the investor's properties without adequate compensation, not to give the "most- favored nation treatment" or to take unjustifiable or unreasonable measures[18] and to apply "Fair and Equitable Treatment". Further, in the BIT are explained on detail what exactly is considered to be expropriation and the conditions under which expropriation may take place. The above limitation of the state's sovereignty can be considered a sort of kind gesture from the Host State's part in order to provide higher safeguards to the investor.

Nevertheless, apart from these "innocent"[19] restrictions the Host State can experience the shrinkage of its sovereignty by unexpected ways. In case the Host State enters a Treaty lightheartedly and unaware of the risks hidden behind this action it is very probable that it will be taken by an unpleasant surprise, which will, most likely, begin with the dissatisfaction of the investor because of the behavior of the Host State. This behavior can whether contain an indirect arbitrary measure or the change of the legislation at the expense of the investor. This will, presumably, end up with the commencement of arbitration proceedings from the part of the investor making the future of the Host State ominous. So what really happens is that the Host State is actually trapped and unable to change its policies or legislate on very crucial matters and important sectors of law and generally important for any organized society, such as the imposition and levying of taxes, environmental issues, commercial regulation, Labor Law matters, health, public safety etc. All the aforementioned categories are of major importance for every State and constitute part of the exclusive competences of every national government.

[17] State sovereignty

[18] It is quite tricky for someone to try to define what constitutes an unjustifiable or unreasonable measure, since there are quite broad notions and through the times there have been given many different explanations.

[19] Innocent meaning that the Host State is aware of these restrictions in a preliminary stage, since they constitute a kind of general principle.

Simultaneously, though, they constitute important issues for the investor. Once the legislation on matters like these will change and, especially, if this happens at the detriment of the investor, then it comes as natural that the Host State has to assess the potential consequences[20] that it will face by the violation of the investment protection provisions or the BITs.

Reasons for This Influence

The reasons for this effect can be various and their roots may differ. They can range from the mere replication of a (the whole text or only a provision) BIT from a fixed model that the Host State uses, which does not really meet the needs of the particular circumstance, to the more generic reason of the misapplication of the agreed investment protection provisions by the arbitral tribunal. It would be futile, however, to list down all the imperfections of the arbitration system that can limit the state sovereignty. We could spend many pages enumerating these deficiencies but we would miss and diverge from the scope of this paper. The route that will be followed will be more specific and aim- oriented to the interaction between investment clauses and state sovereignty.

Sloppily Drafted Arbitration Clauses and Investment Protection Provisions

Whether we talk about an arbitration clause or an investment protection provision, there is no difference, as far as the consequences that the Host State will face, in case of a superficial drafting of those. It was briefly mentioned above, but as simple and unwise as it may sound, there are those times that the investment protection clauses are copied as such by existing ones used in past BITs. Their function is similar if not the same to the model clauses (e.g. UNCITAL, ICSID model clauses). They are, usually, offered by the Host State and are adopted without being adapted to the new regime that is agreed with the investor. This can obviously cause major problems and most often to the Host State. Most under- developed or developing Host States are blinded by their need for investments and their desire for development and as a consequence they just set

[20] We have already mentioned some of them.

aside their negotiating powers by creating an "investment- appealing" environment and by manifestly favoring the investor, with little or no protection for the Host State itself.

It is of undeniable importance that the Host State seriously negotiates with the Investor or Home State. It was stated very correctly from a team of professors and scholars of international law, arbitration and dispute settlement that negotiating BITs and investment protection provision is not just a State's sovereign right, but a sovereign duty. The result of the negotiations must be a custom- made clause that suits the needs of both parties in the particular time. Each investment is different from the other, in terms of nature, time- period, needed safeguards etc. and therefore it cannot be subjected to the same treatment as the rest, by using the same clause in each and every BIT. The drafting of the clauses require high levels of attention and, maybe, help of experts, who are familiar with such procedures. Nonetheless, it must not be disregarded the fact that some under- developed or even developing countries cannot afford to hire these professionals due to their limited budget. This could be a reason that a Host State prefers to use its own means in order to draft an investment protection provision. However, a sloppily drafted clause can create bigger problems/ expenses than the ones that the Home State would have to pay when hiring experts, who, ultimately, ascertain the high level of protection offered to both parties by such a provision.

It was very correctly mentioned in a UN document[21] that "*If countries are unable to properly understand and assess the content of the agreements to which they have agreed because of their complexity, the risk arises that they will enter into agreements that they are unprepared to honour fully.*" Thus, put in an official document, the importance of serious negotiations between the parties is underlined in a really pragmatic and raw way.

What is more to that, the Host State is obliged apart from having to pay burdensome amounts of money (millions and sometimes even billions) to the investor and to possibly lose a part of its sovereignty. It is a real danger for the Host State to sign Treaties that include provisions that are

[21] UNCTAD International Investment Rule Making: stock taking Challenges and the Way Forward - UN Document UNCTAD/iit/2007/3/unsalesnumber.08.II.D.1(2008), pg. 51

not carefully studied. These provisions can significantly limit down its ability to legislate on important matters that concern environmental, health, tax or commercial regulations and these was shown by several cases in the past, to which we will refer later on this paper. Once the Host State enters into an agreement, it automatically accepts the consequences of its provision, which may be grave. As stated in the UN document, it is of great importance for the Host State to understand the meaning of what is ratifying, otherwise it is like locking itself voluntarily in a cage (which is not even golden) without being able to exercise its competences. If a State is unable to exercise its most important power, i.e. to regulate parts of its national legislation according to its mutable interests, because of an investment protection provision, then we can most certainly say that there is a limitation of its sovereignty. Of course, when we talk about limitation or infringement of the state sovereignty we do not really mean that the State cannot change its policies or legislations as it wishes, but if it will do so, it must be ready and willing to keep up to its heavy duties.

Deficiencies of the BIT itself and the absence of equality.

Another reason that resembles to the one we discussed above is the deficiencies that the BIT can hide in its entirety and not only to one clause or provision. Sometimes a BIT itself can be treated lightly or not be taken seriously. Also here, the negotiating part can be forgotten or disregarded, and this fact can lead, consequently, to the problems that we mentioned above. Limitation of state sovereignty and, thereafter, awards including extravagant amounts of money that have to be paid to the investor. It is obvious that when these BITs are signed, the signatories do not actually realize or they cannot imagine the importance of their actions at the moment. They are only seen as an opportunity to extend the network and make public relations with other future investors. Only after the first real problems arise and the arbitral proceedings commence the Host State understands the gravity of the situation.

Despite the former, the lack of a level playing field during the arbitration proceedings between the Host State and the investor is another important issue. Even if the Host State completes the first steps (i.e. signing the appropriate BIT or investment protection provision) with success, it can arrive to the point of not being able to hire experts with great experience on the field of arbitration to represent it, once the arbitration commences. It is widely known that smaller countries lack most of the times not only of money but also of the know- how of handling situations like that. This can be successfully illustrated by the example of an ICSID Arbitration that was commenced by the Commonwealth Development Corporation (a powerful finance company) against the Republic of Seychelles (a small and poor country). The Host State could not afford hiring a top tier legal firm to represent it to the arbitration and, thus, confined itself to be represented by the office of the national Attorney- General, whilst the investor has hired a prestigious law firm. In the end, the Host State was condemned to pay to the investor a huge amount of money, due to lack of defense. We, therefore, conclude that sometimes it may not be the fault of the clauses or the BITs that the Host State's sovereignty is being limited, but the inherent absence of a level playing field between the Host State and the investor in terms of experience, money and influence.

Public Sector v. Private Sector Gap- Friends or Enemies?

Regardless of the great importance that the abovementioned reasons[22] are, in the writer's opinion it should not be pretermitted another factor that always comes up when there is an interaction between the public and the private sector. There is an eternal battle between these two sectors, since their interests are mostly conflicting. When these interests are not conflicting but coincide, then we inevitably have a competition between these sectors about which one will gain and maintain a strategic advantage.

In the field of investment, obviously, the Host State represents the public sector and the investor the private sector. Consequently, even though someone would innocently thing that it is to the interest and the prosperity of the State to have healthy, thriving enterprises in its territory that is not always the case though. When it comes to investment and especially foreign investment[23], the Host State pursues its predominance among the various investors, by reminding with several

[22] "Sloppily Drafted Arbitration Clauses and Investment Protection Provisions" and "deficiencies of the BIT itself and the absence of equality".
[23] Sometimes domestic investors get a better treatment.

ways that it is the one that has control over its territory. The Host State has one ultimate goal, to protect its sovereignty and, therefore, once it feels threatened by the behavior of the investor, it automatically tries to diminish threat that. But the truth is that the State does not have to feel threatened or in jeopardize in order to get preventive measures against the investor. Reasons of public safety are always a good solution when a State wants to justify its –more aggressive- policy.

On the other hand, the investor, also known as private sector, tries to counterpoise this pre-existing imbalance. It is maybe in the nature of the financial and business sector to be incorrigibly antagonistic in order to survive the difficulties of the market. The investor sends its own defensive message to the Host State and tries to take advantage of every chance that will be given to it. It is stated very correctly to an article[24] published on the Economist that "*Multinationals have exploited woolly definitions of expropriation to claim compensation for changes in government policy that happened to have harmed their business"*. In only one sentence it is included successfully the reality of how this mechanism works. This lack of trust created by the behavior described above is difficult to be rectified.

Case Law Relative to the Effect of Investment Protection Provisions and Investment Arbitration on State Sovereignty

Through the years there has been a number of cases supporting the argument that investment protection provisions and the ISDS mechanism in the BITs is actually having a big impact of restrictive nature on the ability of a state to regulate freely. This number increases as the years pass and the greed of certain corporations increases. There is, though, the other side of the case law, too, that shows the exact opposite. The one of the Host State exceeding its powers and also the limits put in the BIT and disrespecting the agreement made between the parties. We will see and comment below on some of the milestone cases, which are set as examples and prove that the issue discussed in this paper is definitely not one- sided and must be examined on a case by case basis.

[24] 'Investor- state dispute settlement: The arbitration game', The Economist, 11th Oct 2014

Vattenfall v. Germany I (coal-fired electric plant) and Vattenfall v. Germany II (nuclear energy)

In April 2009 the Swedish energy utility Vattenfall[25] brought the German government to international arbitration. The arbitration challenges environmental restrictions imposed on a €2.6 billion coal- fired power plant being under construction in German territory. A long before 2009, when Vattenfall announced its intention to build a power plant in Germany, there was a lot of controversy arisen between the political and social circles, with the one part claiming that the power plant is a lot more than what Hamburg needs and would have a very damaging effect to the environment. Nevertheless, the city of Hamburg signed a preliminary work permit/ agreement with the company at 2007. After one year, in 2008 the final agreement was signed. However, in its text there were more restrictions than the ones included in the first text signed in 2007. Germany justified the above by saying these restrictions were necessary in order for Germany to comply with the European Legislation. Vattenfall contrasted that regardless Germany's excuses the, under the new circumstances the power plant would be inefficient and uneconomical, therefore not a good investment for the company. It concluded that by its behavior Germany violated the investment agreement that signed with the claimant 1 year ago and also the provisions of the Energy Charter Treaty that signed 1997.

In this case the issue of state sovereignty on regulating environmental legislation is the focus point. The reasons that were probably invoked for the commencement of arbitration were the ones of expropriation (and the relative compensation) and fair and equitable treatment. As already mentioned, the threat of an arbitration, or in our case of a burdensome award, can have the so- called "regulatory chill effect" and deter the Host State from implementing new policies that concern public safety and are of major importance for the health of the civilians and the environment too. Because of the specific arbitration there was an upheaval in the German society, with the public being concerned of how much tax- payer money Germany would have to pay as a compensation and its constrained ability to regulate certain matters because of various investments. In addition to that, the lack of procedural transparency was definitely aggravating

[25] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6)

and escalating the existing tension. Finally, in 2012 Germany was condemned and the Vattenfall power plant started operating.

In May 2012 a second arbitration[26] was launched with Claimant and Respondent the same as indicated above, only this time the investment made was a nuclear power plant. However, the main issue of Germany's ability to regulate on important legislative pieces was re- introduced. Specifically, after the Fukoshima accident on 2011, Germany decided, for ensuring a higher protection and in order to avoid similar future disasters, to amend the Atomic Energy Act and to shut down some of the old reactors, two of them owned by Vattenfall. Hence, the company claimed once again that the Host State violated its obligations towards the foreign investors according the Energy Charter Treaty, by revoking the operation of reactor, which was prolonged in 2010. Unfortunately, Germany in just a couple of years was put twice in the difficult situation of not being able to freely regulate because of the investment protection agreements it signed. This case was another reason for questioning the nature of the investment protection agreements and how harmless and innocuous they can be, when it comes to the most important competences of the Home State.

Philip Morris v. Australia and Philip Morris v. Uruguay

The biggest interest hides in the much discussed Philip Morris case that is explained below. In 2011 a Hong Kong subsidiary[27] of the US based tobacco corporation Philip Morris, commenced arbitration proceedings against the state of Australia, challenging its landmark anti- smoking law. The requirements set by the Australian law were the following: there should be health warnings in both sides of the package, in order for the public to be warned for the negative effects of the smoking. The name of the brand should be written in the lower part of the package in standard font size. Philip Morris argued that this legislation was harmful for his interests and it might cost the corporation losses of billions of dollars. Moreover, it stated that Australian public health law "expropriated its valuable intellectual property" (by prohibiting the display of its logo, brand

[26] Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12), pending
[27] Philip Morris Asia Limited v. The Commonwealth of Australia, Notice of Arbitration, Ad hoc—UNCITRAL Arbitration Rules (2011)

colors and, in general, the traditional -classic over the years- package) and violated its right to "fair and equitable treatment" as agreed and signed in the Australia-Hong Kong BIT[28]. In addition to that, the corporation bought shares from an Australian holding company on the same time that the specific policy was announced. Regarding the Philip Morris' last move Australia stated that this was a strategic move from the part of Philip Morris, for just one reason, namely to use this investment as an instrument against the BIT signed between the corporation and the Home State.

Apart from the arbitration proceedings, Philip Morris initiated simultaneously proceedings[29] in the national courts of Australia and, in particular, through the Highest Court. However, its claim was dismissed and the Court ruled that what Australia did was not at all an unlawful expropriation of Philip Morris' property, but on the contrary was an endeavor of the state to protect its civilians. The plain package initiative was complimented even from the World Health Organization and characterized as one of the greatest examples for public health policy. Regardless to the latter, Philip Morris continued its aggressive policy against Australia with its arbitration and refused to allow open to the public hearings, disregarding Australia's request, with the justification that it would not give any added value to the proceedings and that the public would be able to get informed on and have access to the documents after the conclusion of the proceedings.

Same as the case above, a Swiss subsidiary of Philip Morris launched arbitration proceeding against Uruguay[30], because of some anti- smoking measures that Uruguay implemented in its legislation. Philip Morris claimed that these measures resulted to a huge loss of profits for the corporation, for which it seeks for compensation, and, what is more to that, it stated that it fails to see the connection between the labeling policy that Uruguay implemented and the protection

[28] Philip Morris Asia Limited v. The Commonwealth of Australia, Notice of Arbitration, Ad hoc—UNCITRAL Arbitration Rules (2011), at paras. 1.5-1.6.

[29] It is mentioned in this paper the danger that one of the dangers of the investor- state dispute settlement is the double chance that the investor has. In case the court's decision will not have a positive outcome, there is always the arbitral award to wait for, and vice versa.

[30] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay) - See more at: http://www.italaw.com/cases/460#sthash.pe5TklPh.dpuf

of public health. The only thing that Uruguay achieves, Philip Morris continues saying, is to violate the BIT it signed, by expropriating the corporation's trademark and by taking irrational measures. In this circumstance too, as in other cases mentioned in this paper, Uruguay undergoes a sort of limitation in its sovereignty. However, it is not because of a sloppily drafted arbitration clause or a deficient BUT that the sovereignty of the state is affected. If we look closer to the Uruguay's BIT[31], we will see that the BIT itself cannot be blamed of creating an unfavorable environment for the state. On the contrary, it protects Uruguay and enshrines its right to recourse to the national courts. Therefore, the reasons of such a limitation focus more on the persistence of Philip Morris to find faults not only in the text of the BIT, but also in the national law of Uruguay and in comparison with international law rules. It is a self- evident truism, the continuous conflict of interests existing between the public and private sector with the one trying to rule over the other.

The first case was concluded on December 2015 and Australia won this legal battle. The second case is pending, but it is an undeniable truth that they both resulted to the creation of fear to the states, regarding the implementation of anti- smoking policies and legislation. However, the victory of Australia sent a loud message to all the other states involved in an arbitration and experiencing infringement of their sovereignty.

Eli Lilly v. Canada, Veolia v. Egypt and Yukos Universal Limited (Isle of Man) v. The Russian Federation

Eli Lilly[32], one of the biggest US pharmaceutical companies, brought arbitration proceedings against Canada for medicine patents under the legal basis of the North American Free Trade Agreement (NAFTA). In particular, Eli Lilly challenged the Canadian patent law standards, after a Canadian Court invalidated the company's drug[33] patents, with the justification of not meeting the standards imposed for Canadian law, a fact which made the specific medicines not as

[31] According to Law 16,100, which ratifies Uruguay's BIT with Germany and is used in its general form for all the other BITs Uruguay is signing.
[32] Eli Lilly and Company v. Canada (ICSID Case No. UNCT/14/2)
[33] For the treatment of attention deficit hyperactivity disorder, schizophrenia and bipolar disorder

effective as they claimed to be. As a consequence, other companies managed to replicate the specific drugs and sell them to the market in lower prices, which resulted to huge losses for Eli Lilly. In the commenced arbitration the company asked not only for the court's decision to be re-evaluated but also the legal basis of Canadian law patent standards. This, of course, resulted to many high- tempered discussions on the power that investors can have, namely asking for the revocation of a national court's decision and the amendment of national law in favor of the company's interests.

In the next case[34] we are going to see a matter of labor rights' regulation and its possible restriction by investment arbitration. Veolia is a company that undertook the waste management in Alexandria, Egypt with a contract of fifteen years timeframe. Veolia commenced an arbitration against Egypt as it claimed that the changes Egyptian government implemented in its national labor law, and, particularly, the changes regarding the minimum wage was a violation of the BIT and investment protection agreement the parties signed. Besides that, it also resulted to losses for the French corporation and for turning its investment to non- profitable. The case is still pending, but irrespective of its results, here too the arbitration had a chilling effect to the government's actions.

Nevertheless, there are also cases that the State was held liable for misconduct. We could use the Yukos case[35] - a classic case of indirect expropriation-, where the tribunal righteously stated that, despite the fact that the claimant should always expect justifiable reactions from Russia (the Host State) for the company's tax invasion, it could not possibly expect that Russia would act in such an extreme and partial way, given that tax invasion was conducted by almost all the big companies in Russia, and nevertheless only Yukos and its CEO were charged and sentenced. This indicates, at the very least, political incentive and the will to destroy Yukos. It need only common sense for someone to realize, that Russia did not have to directly expropriate the company, but the measures and the actions that held against the company were enough to make the existence of the company unbearable and achieve an indirect expropriation. Likewise, it is obvious that the

[34] Veolia Propreté v. Arab Republic of Egypt (ICSID Case No. ARB/12/15)
[35] Yukos Universal Limited (Isle of Man) v. The Russian Federation

expropriation was not carried out under the due process of law by recalling the treatment that Yukos' CEOs underwent.

Investor State Dispute Resolution (ISDS) on TTIP

Whilst the EU and US officials are positive and supportive towards the idea of ISDS, there is a big party of professionals, politicians, law professors, NGOs and civilians that are opposed to it and consider it a "toxic mechanism". But what really is ISDS and how is it linked to investment protection provisions and state sovereignty. ISDS is a legal mechanism that gives the opportunity to the investor of a third country to bring a claim against the state that it made the investment, instead of resorting to the national, slow- moving courts[36]. The legal basis of the claim is a state action that allegedly reduce the value of the investment or caused loss to the investor. Like other Investment Treaties[37], TTIP and its highly controversial suggestion (ISDS) promises to higher the level of protection offered to European and US investors respectively and simplify the general context and procedural matters of these trade/ investment agreements between the parties.

As regards the linkage between ISDS and investment protection provisions with state sovereignty, it is rather obvious. The legal basis of the ISDS mechanism is the thousands of BIT signed between states and investors and the investment protection provisions and arbitration clauses included in them, which provide for solutions in case a dispute will arise between the Host State and the investor. The guarantees[38] that an investment protection provisions provides to the investor, are also foreseen in the ISDS provisions. ISDS is an advanced form of arbitration. Advanced because it offers a private body of arbitrators and a handful of influential experts and professionals to rule over the difference arisen.

[36] This can further be interpreted as a second chance for the investor to re- litigate in case his claim does not have a successful outcome in the domestic courts of the state.
[37] Comprehensive Economic Trade Agreement (CETA) with Canada, and other agreements with India, Singapore etc.
[38] i.e. protection against "unfair and inequitable treatment", protection against discrimination, in terms of "national treatment" or "most favored nation treatment", protection against expropriation without adequate compensation or indirect expropriation, protection of capital transfers

The former will take us easier to ISDS's connection with state sovereignty. Even though no arbitral tribunal has the power to change or even ask from a State to change its legislation, it is believed that many States, under- developed or with limited resources, in order to avoid having to pay extreme compensations, change their legislation to a point suitable for the investor. Hereafter, the tribunal has an indirect effect on the state's sovereignty. It does not directly force any government to regulate differently, but subconsciously it is asked from the government to do so. Additionally, as mentioned previously the fact that domestic courts can be bypassed or overruled can and will have a tremendous effect on a nation's sovereignty. Therefore, it should not be overlooked or taken lightly the influence that the ISDS mechanism can have on a state's prosperity and independence.

At this point, it is true that there are fears concerning the injurious effects that this political and theoretical scrutiny can have to the negotiations on the proposed text of TTIP. The skeptical or even angry voices do not seem to allay. And on the other hand, the political leadership shows an intransigent and inflexible mood. As it will be indicated below, their alleged arguments are very compelling.

Opinion of ISDS Opponents

It became more than obvious by now that ISDS is for the biggest part of the society not only a debatable and questionable matter, but also loathsome and something to be avoided. There are many countries[39] in today's economy that have renounced the ISDS mechanism and the ICSID Convention in general, while Australia stated that it will exclude the mechanism from its future investment agreements. In several letters and articles being written by scholars and professors of law addressing this matter it the arguments are very alarming.

First, it is explained that as a consequence of the existing loopholes in the text of the investment agreements and also the TTIP, it is created a favorable environment for forum shopping. More specifically, the vagueness of the provisions of these agreements helps the investors- companies

[39] Ecuador, Bolivia, Venezuela, South Africa.

create subsidiaries in more favorable fora and take advantage of these (i.e. the agreements)[40]. Apart from that, lack of transparency is considered another danger, since most of the ISDS proceedings are of confidential nature and not publicly open. The lack of independence and impartiality of the arbitrators is another argument that even though it was and it is widely used when people refer to the drawback of arbitration, it does not fail to be true. Inasmuch the arbitrators are private lawyers or experts from other professions with no guarantees, this is always possible. Despite the above, they say that ISDS can be an important deterrent, regarding the adoption of new legislation on the protection of consumers, public health and the environment, in particular for smaller countries, as there will be the fear of challenge by large companies. On top of all these, European taxpayers could witness their governments offering public funds to cover costly legal fees and other costs associated with arbitration procedures, cumbersome compromise agreements, or claims.

Additionally, there is the factor of unpredictability of the outcome of the decision/ award, since there will be no case- law given the fact that, in terms of ISDS' confidential nature, the documents will be restricted. Moreover, it is of great importance the issue of uncertainty about the meaning and the interpretation of the obligations included in an investment treaty. It is terrifying yet true that a team of three individual with sometimes little or no legal or legislative knowledge can influence, in such a depth, governmental policies. By this, apart from giving a not inconsiderable power to a small group of people, large, influential corporations are given exclusive advantages against the smaller ones and even against the interest of the Host State.

Last but not least, one of the biggest concerns that the opponents of ISDS express is the grave repercussions that the mechanism would have to the domestic sovereignty of the Host State. It was analyzed and mentioned several times before that the state sovereignty can be affected in an insidious way, meaning that since the arbitral tribunal does not have the power to directly change the regulations of a state, it can achieve that in an indirect way by putting pressure and threating of imposing high compensations etc. In the European forum Germany and France are

[40] It is referred to as "nationality shopping".

openly against the adoption of such an instrument. More specifically, Germany fears that by allowing the inclusion of ISDS in the TTIP the European Council's and its own policy space will be diminished. Amongst other, it expresses the fear that States will no longer be free to regulate according to their wish important areas of governmental policy such as healthcare, environmental protection, public safety, social services etc. It continues by arguing that the various national legal systems in Europe are adequate and with high safeguards for US investors.

Opinion of ISDS Proponents

The proponents of the ISDS mechanisms are considerably fewer than the ones opposed to it, yet undeniably more powerful. Amongst the supporters of the mechanism there are many EU and US officials, who actually take the last decision and have the last word, and also some European governments with great power.

Their main argument is that the mechanism will encourage investment flows and "will ensure equal access to justice and will not undermine democracy"[41]. Moreover the EU answers to the fears of the German Government by saying that[42] "measures taken for legitimate public purposes, such as health or environment protection, cannot be considered equivalent to an expropriation (indirect expropriation)". They claim that ISDS will simplify the complicated procedure of filling a claim in another country and thus the parties will save time and money. In addition to that, they proclaim that there is no better proof that ISDS takes law seriously than giving the opportunity for someone to commence arbitration with a final award.

The British Government is of the opinion that the mechanism is welcomed, only because the US constitutional law and its general regulatory framework isn't as consistent as the European one and, therefore, ISDS is preferable since it provides for a higher threshold to the European investors. On the same line, the Czech Republic is strongly supporting the inclusion of the dispute

[41] Albrecht, J. P., 'Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on International Trade on recommendations to the European Commission on the Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)', European Parliament – Committee on Civil Liberties , Justice and Home Affairs, 2014, pg. 5 point (h).

[42] 'INVESTOR- STATE DISPUTE SETTLEMENT (ISDS) PROVISIONS IN THE EU'S INTERNATIONAL INVESTMENT AGREEMENTS', Directorate- General for External Policies, 2014, pg. 10

settlement mechanism in the TTIP, as it has already adopted a similar bilateral investment agreement with the US and, hence, experienced by first hand its positive effects and future advantages.

Conclusions

The main purpose of this paper was to reflect on the concern of several critics on whether the investor-state arbitration restricts the ability of a government to impose new taxes, or to regulate public safety, commerce or health. It specifically posed three main questions which were answered in the previous chapters respectively. The questions are the following:

i) Is it true that investment arbitration can limit down the sovereignty of a State or is it just a meaningless fear?

ii) If the allegation is true, what is the kind and the size of impact that these clauses have on a government's law-making decisions?

iii) Lastly, is such an impact a problem created by sloppily drafted arbitration clause/ investment protection provision, or is it maybe a flaw of the Bilateral Investment Treaties themselves? What other reasons could result to that?

More detailed, one can say now with the certainty that today's experience shows that investment arbitration and, specifically, investment protection provisions can hide dangers and put the Host State in a very unpleasant situation. Investment arbitration, however, cannot be considered a culprit, at least not the major one. One cannot blame an institution for the limitation of the state's sovereignty. It is similar to blaming the institution of domestic courts for not distributing justice in a righteous way. An institution cannot be blamed for itself. Nevertheless, what one can consider liable for this situation is i) the lack of quality education of the judges, arbitrators respectively, ii) the non- existence of high safeguards and meticulously drafted national law, in the investment protection provisions/ arbitration clauses/ BITs respectively and last but not least iii) the continuous competition between the public and the private sector. The last point is, generally, underestimated and not given the attention that it should. It is not mentioned as a factor that could, by nature, limit the powers of the state. Regardless the attention it is given though, the truth is that there is a battlefield between public and private sector, with the one trying to override the other.

Additionally, by the case law cited and commented above it is needless to say that the impact investment protection provisions and BITs[43] have on the freedom of a state to regulate is, if not always negative, most certainly immense. It can, most certainly affect the policy followed by a country, its economy and prosperity and, consequently, the lives of its civilians. Unfortunately, in all the cases it was demonstrated that the chilling effect, which the fear of a high compensation can create, is a sad reality. There is not even one case showing us that the Host State stayed untouchable or unaffected by the investor's aggressive and exploitative behavior. The examples given were dealing with the most important sectors that a state can legislate on, namely energy and public safety (Vattenfall II), environment (Vattenfall I), public health (Philip Morris, both cases), labor rights (Veolia), health and commerce (Eli Lilly). In only one case (Yukos), the state was righteously found liable for the expropriation of the investment and having as its only goal the damage of the investor.

Regarding the ISDS mechanism, there was a brief comment stating the opinions and arguments of both sides and further showing that the current text cannot really benefit the autonomous legal orders in the European territory, since it does not diminishes the existing threats. Unquestionably, though, if ISDS is implemented in the TTIP, it will shake the grounds of the EU, with the hope of not resulting to the collapse of its institutions. It is also mentioned the negative effect that the long- lasting negotiations can have on the mechanism. And this can, moreover, create the question of whether the TTIP could survive without the ISDS[44].

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[43] The writer does not refer here only to the sloppily drafted i.p.p.s or deficient BITs, but to the attentively drafted ones.

[44] A written debrief on the point that today's negotiations arrived is necessary. On November 12th, 2015 the European Commission, announced and presented, as promised, its new reformed proposal on investment arbitration and a new more transparent investor- state mechanism, as part of the negotiations for a transatlantic trade and investment partnership. The new proposal includes the ascertaining of the right to regulate, a special court for investment and an appeal court based in clearly defined rules, with more qualified judges and transparent procedures. However, the opponents of the idea still seem preoccupied. "New system, same corporate privileges",

The limitations of this research were important since the subject discussed in this paper is relatively new and the existing bibliography is quite limited. Hence, the efforts made by the author were genuine with the hope of giving a satisfying result, too.

says Friends of the Earth, and it continues by saying that the Commission's proposal “will drastically increase the risk of claims against the EU and continue to give special privileges to foreign investors at the expense of the environment and citizens”. In addition, part of the European Parliament expressed its dissatisfaction and regret to the re-introduction of the mechanism for the settlement of disputes. It specifically stated that “The new proposal has a new name - investment court system - but essentially it continues to give foreign investors more rights than to any ordinary citizen or to domestic investors. Where is the public interest in having an ISDS system?”. Up to this point there are no other updates on the specific matter.

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